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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1279

THE WILLIAMS & WILKINS COMPANY,

Petitioner,

v.

THE UNITED STATES,

Respondent.

BRIEF OF *AMICI CURIAE*, AMERICAN GUILD OF AUTHORS AND COMPOSERS, BEHAVIORAL PUBLICATIONS, INC., EDWIN H. MORRIS & CO., INC., HARCOURT BRACE JOVANOVICH, INC. AND MACMILLAN, INC., IN SUPPORT OF PETITIONER

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BRIEF OF *AMICI CURIAE*, AMERICAN GUILD OF AUTHORS AND COMPOSERS, BEHAVIORAL PUBLICATIONS, INC., EDWIN H. MORRIS & CO., INC., HARCOURT BRACE JOVANOVICH, INC. AND MACMILLAN, INC., IN SUPPORT OF PETITIONER

This brief is submitted jointly by the American Guild of Authors and Composers, Behavioral Publications, Inc., Edwin H. Morris & Co., Inc., Harcourt Brace Jovanovich, Inc. and Macmillan, Inc. with the consent of the parties. None of the above *amici* are members of the associations also filing *amicus* briefs.

Harcourt Brace Jovanovich, Inc. and Macmillan, Inc. (or their subsidiaries) are major, diversified publishers of general, scientific and educational works. Behavioral Publications, Inc. is a publisher of textbooks and journals.

Edwin H. Morris & Co., Inc. is a music publisher whose business includes educational music publishing of sheet music and folios. The American Guild of Authors and Composers is an association of approximately 2,500 American composers and lyricists.

Thus, the *amici* herein represent a broad spectrum of private enterprise creators and publishers of general, educational, scientific, and technical publications and musical compositions. The decision of the Court of Claims strikes at the heart of their private sector efforts and investments in the creation and dissemination of literary works.

The decision below, though purportedly limited to the rights of petitioner and the practices of the National Institutes of Health (NIH) and National Library of Medicine (NLM), raises general legal issues regarding copyright protection. The *amici* herein direct their argument to two of these issues: (1) the Court of Claims' erroneous view of the rights to "copy", "print", "reprint" and "publish" accorded to copyright proprietors by Section 1 of the Copyright Act; and (2) the Court of Claims' conclusion that the rights and privileges of copyright and the public interest are in conflict, which contradicts the Constitutions dictate that the grant of copyright "promote[s] the Progress of Science and Useful arts" (Article 1, Section 8).

Preliminary Statement

The decision of the Court of Claims in this case permitted the unauthorized reproduction and distribution of petitioner's entire copyrighted works. Its effect is to open the gates to the preemption of *amici's* literary property without compensation.

Clearly under our economic system private sector creators and publishers of intellectual property can survive only if the law remains protective of their proprietary rights in intangible property to the same extent as it respects private interests in tangible property. There is nothing novel or radical in the notion that literary property is of economic worth to its creators and to the country's economy. Mr. Justice Roberts dissenting in *Interstate Circuit, Inc.* v. *United States*, 306 U.S. 208, 236 (1939), stated the general rule that creators of literary property are accorded "the same rights as inhere in other property under common law." At all times prior to the institution of this action and during its pendency, private sector authors and publishers have made it clear that they are not opposed to the fullest dissemination of their copyrighted works. However, they have insisted, as do *amici* now, on their rights to compensation.

It should be noted that the Court of Claims found that in the instant case "NIH leases its Xerox machines from Xerox Corporation which it pays according to the number of pages photocopied." F. # 15, Pet. App. 80.* However, in its express concern for the public interest the Court below saw no inconsistency between payments being made to the owner of the tangible photo-duplicating equipment and its holding that the public interest required unpaid-for duplication of copyrighted works.

The Interests of *Amici*

The *amici* herein include two of the largest educational and reference publishers in the country, a specialized publisher in the social sciences, a leading music publisher, and an association of the creators of musical works. All of the *amici* function in the private sector of our economy. They are dependent upon income from their copyrighted works to survive and continue their functions. Among *amici's* publications are various works which are particularly susceptible to unauthorized photocopying. These include: professional, academic and technical journals; text-

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* References to the Opinion and Findings of Fact ("F") of the Court of Claims are to the Appendix to Petition for Certiorari, herein referred to as "Pet. App."

books and scientific treatises; sheet music; consumable workbooks, tests and teaching materials and compilations, anthologies, encyclopedias and other reference works used in piecemeal fashion rather than read cover to cover. The decision of the Court of Claims permits wholesale, unlicensed and unpaid-for photocopying. Although on a short term basis this may appear desirable as facilitating the availability of these works, the inexorable long term consequences must be the erosion of incentive for private enterprise to invest in the creation and dissemination of such works.

ARGUMENT

POINT I

The Court below misconstrued the constitutional purpose of copyright and the nature of this case.

Article I, Section 8 of the U.S. Constitution provides that Congress shall have the power:

> "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;"

Thus, the clear Constitutional purpose of copyright is to foster creativity and scholarship in order to facilitate and enrich the cultural and technological development of the nation. Because they envisaged a private enterprise economy, the framers of the Constitution established that this end would be best served by *economic* encouragement to *private sector* creators of intellectual property. In *Mazer* v. *Stein*, 347 U.S. 201, 219 (1954) this Court recognized that:

> "The economic philosophy behind the clause empowering Congress to grant patents and copyrights

> is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in 'Science and useful Arts'. Sacrificial days devoted to such creative activities deserve rewards commensurate with the services rendered."

Neither the creation of *ad hoc* judicial exemptions to the principle of economic incentive nor the preemption of private proprietary rights in intellectual property can or will serve the public welfare under the framework established by the Constitution. As stated by A.R. Spofford, Librarian of Congress from 1864 to 1897:

> "Without stopping to consider the theory of those who hold that there can be no property in ideas, that all human thought should be free, and that printed thought, no less than oral utterances, should be spread abroad as on the wings of the wind, without money and without price, it may be said that this kind of literary communism would result in starvation to authors, however pleasant or profitable it might be to the rest of mankind." [Spofford, *Copyright In Its Relations to Libraries and Literature*, 1 American Library Journal 84 (1876)].

In repeatedly emphasizing its view of the "personal" uses of copyrighted works by "scholars" (e.g., Pet. App. 8) and the use of respondent's libraries' photocopies by "scientists" for their "personal" purposes (e.g., Pet. App. 14) the Court below has perverted the language of the Constitution so that the public welfare is deemed not to be the objective of copyright protection, but merely an adversarial consideration. In place of the clear judgment expressed in the Constitution the Court of Claims substituted its view that the elimination of authors' and publishers' rights best serves the public interest.

The Court of Claims' decision is based on a fundamental misconception of the nature of this case. *This case simply does not involve a scholar's or scientist's personal (or other) use of copyrighted works.* It involves, rather, respondent's libraries regular and systematic production, promotion* and distribution *to* scholars, on a massive scale "dwarf[ing] the output of many small publishing companies",** of copies of petitioner's copyrighted works —i.e., it involves *publishing* in preemption of petitioner's own function.

As emphasized by a noted law school librarian, library photocopying of the type here at issue "constitutes two or more separate and distinct transactions: the copying by the library and transfer to the reader; and the reader's subsequent use of the copy. It is important to keep this in mind." Price, *Photocopying By Libraries of Copyrighted Materials,* 5 Bull. of the Copr. Soc. of the U.S.A. 345, 347 (1968). Only the first mentioned transaction is relevant to this case. "The library's act is complete at this point . . . [t]he reader did not make the copy; the library did. . . ." Price, *supra* at 355. Indeed, it was the libraries in this case which made the decision not to charge for the copies and not to compensate petitioner; and in the case of NLM, the library, not the reader, decided that photocopies would be provided in lieu of the original (F #20(c), Pet. App. 84).

It is established law that the reproduction of a copyrighted work, even if in response to a request by a third party, is an infringing act on the part of the copier. E.g., *Greenbie* v. *Noble,* 151 F. Supp. 45 (S.D.N.Y. 1957). That the ultimate recipient is a scientist or scholar making

* E.g., through NLM's *Index Medicus;* see F #20(c), Pet. App. 83.

** Pet. App. 31 (Cowan, C.J. dissenting).

personal use of the copy is both an inaccurate view of the facts of this case* and entirely irrelevant.

Scholars and scientists are, of course, the principal market for much of *amici*'s works. The servicing of their needs for retained personal copies of copyrighted works is, under our private enterprise system, a function to be performed by publishers, not by extension of the reference and loan function of libraries. The Court of Claims' failure to recognize this fact of economic life pervades its entire opinion. It is particularly relevant to the lower Court's erroneous and unprecedented application of the doctrine of "fair use." Cf. *Leon* v. *Pacific Telephone & Telegraph Co.,* 91 F.2d 484, 486 (9th Cir. 1937); *Wihtol* v. *Crow,* 309 F.2d 777 (8th Cir. 1962). The Court below explained that in the *Wihtol* case, a finding of copyright infringement rather than fair use was proper because it was "as if the defendant had purchased one copy of sheet music and then duplicated it for an entire chorus." Pet. App. 13 n. 12. It is submitted that this is a very accurate description of respondent's practices here at issue. The facsimile duplication of entire scientific works for dissemination to any interested member of the scientific community is an appropriation, not a "use," of literary property.

POINT II

The photocopying of copyrighted works by respondent's libraries is a violation of the exclusive rights to "copy", "print", "reprint" and "publish" conferred by the Copyright Act.

Section 1(a) of the Copyright Act accords to the owner of copyright in all "copyrighted works" the "exclusive

* Approximately 12% of NLM's photocopies were provided to private commercial businesses. F #21(a), Pet. App. 84. Also, neither NIH nor NLM imposed any restrictions on the receiving parties' use of the photocopies. The record demonstrates that some requesters "put them in files for use by co-workers or others." [F #6(b), Pet. App. 76], and others "make further photocopies from copies obtained from the . . . library to distribute to colleagues or otherwise" [F #17(b), Pet. App. 81].

right" to "print, reprint, publish, copy and vend." Notwithstanding the unambiguous language of the statute, the majority of the Court of Claims expressed a "solid doubt" whether the right to "copy" established in section 1(a) applies to books and journals. Pet. App. 9. The Court's conclusion on this point must be considered more than mere *dicta* because it expressly considered this doubt to be a "powerful factor" in determining that the activities of respondent amounted to fair use. Pet. App. 23. The Court also held that the photocopying activities of respondent did not amount to a "print[ing], reprint[ing] or publish[ing]" within section 1(a). Pet. App. 10-11.

In reaching these results the majority of the Court of Claims perverted the clear meaning of the statutory language, ignored the applicable precedents and the findings of fact in the case, and drew unsupportable inferences from matters outside the trial record. A most apt description of the decision below is that used by this Court in *Washingtonian Publishing Co.* v. *Pearson*, 306 U.S. 30, 39 (1939): "[It does] not square with the words actually used in the statute, would cause conflict with its general purpose, and in practice produce unfortunate consequences. We cannot accept it."

Amici respectfully urge that (A) the right to "copy" is applicable to books and periodicals, (B) the photoduplication of copyrighted works is a "printing" and "reprinting" thereof, (C) the respondent's libraries providing of photocopies of copyrighted works to library users is a "publishing" thereof, and (D) the rights of "reproduction" and "transcription" of section 1(c) of the Copyright Act are relevant to this case.

A. The Right To "Copy" Applies To Books and Periodicals.

The photoduplication of copyrighted works is a "copying" thereof. Respondent produced facsimile reproductions of petitioner's works in a fixed, tangible and visually perceivable form. In *White-Smith Music Publishing Co.*

v. *Apollo Co.*, 209 U.S. 1, 16 (1907) this court held that the word "copy" as used in the Act refers to that term "in its ordinary sense of indicating a reproduction or duplication of the original."* See also, e.g., *King Features Syndicate* v. *Fleisher*, 299 Fed. 533, 535 (2d Cir. 1924); *Blazon, Inc.* v. *DeLuxe Game Corp.*, 268 F. Supp. 416, 434 (S.D.N.Y. 1965). Indeed, in contemporary usage photomechanical duplication is the essential act of proscribed copying. See *Walt Disney Productions* v. *The Air Pirates*, 345 F. Supp. 108, 110 (D. Cal. 1972) ("While the character was not copied in the sense that it was photographically reproduced, it was drawn as nearly like the plaintiff's drawing as defendant could make it.")

The majority of the Court of Claims was apparently not disposed to frontally question the irrebuttable conclusion that respondent's libraries had "copied" petitioner's works. They achieved the same result by asserting that the right to "copy" under Section 1(a) might not "appl[y] to books and journals" (Pet. App. 9), thus suggesting that the principal component of *copy*right protection is inapplicable to the major vehicles of literary creation. However, this assertion is equally unsupportable. As this Court has observed, one of the "monopolies" conferred by the Copyright Act is "that of making copies" [*Jewell-LaSalle Realty Company* v. *Buck*, 283 U.S. 202, 204 (1931)], and the "copying" right so accorded by Section 1(a)—unlike the rights accorded by other provisions of Section 1 of the Copyright Act**—is expressly applicable to all "copy-

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* Although the *White-Smith* court concluded that a pianola role is not a "copy" of the recorded music, that is irrelevant to this case. Respondent's activities result in a visually perceivable duplication in "intelligible notation" and thus meet the very definitional tests there established by this Court.

** Thus, Section 1(b) deals particularly with "literary works", "non-dramatic works", "dramas", "musical works" and "models or designs"; Section 1(c) treats specifically of "lectures, sermons, addresses" and "literary works"; Section 1(d) is directed to dramatic works and 1(e) to musical compositions. These provisions as to exploitation of specific works are to be contrasted with the general applicability of Section 1(a) to "copyrighted work[s]".

righted work[s]", without distinction or limitation. The Register of Copyrights has noted that under Section 1(a) "*all categories* of copyrighted works are protected against the making and publication of copies", and Section 1(a) embraces "the twofold right to make and publish copies". Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law 21-22 (1961) (emphasis added).

That the right to "copy" is applicable to books and periodicals is clearly established by case law. In *Greenbie* v. *Noble*, 151 F. Supp. 45, 63 (S.D.N.Y. 1957), an action for infringement of copyright in a book, the court observed that "the mere printing or copying of a copyrighted work, without proof of sales thereof, will constitute an infringement". See also, e.g., *Maloney* v. *Stone*, 171 F. Supp. 29, 32 (D. Mass. 1959); *Platt & Munk Co., Inc.* v. *Republic Graphics, Inc.*, 315 F. 2d 847, 851 (2d Cir., 1963). As stated in *Wihtol* v. *Crow*, 309 F. 2d 777, 780 (8th Cir. 1962), "obviously the plaintiffs had the exclusive right to copy their copyrighted song and obviously [defendant] had no right whatsoever to copy it". This principle is as applicable to books and journals as it is to songs; the "infringement" of a "book" is "the copying of some substantial and material part thereof". *Eggers* v. *Sun Sales Corporation*, 263 Fed. 373, 375 (2d. Cir. 1920).

The applicability of the right to "copy", without more, to books and periodicals is also demonstrated by other sections of the Copyright Act. Thus, Section 101(b) provides for the assessment of statutory damages for the infringement of books and periodicals in an amount of $1 "for every infringing copy made *or* sold by *or* found in the possession of the infringer . . . . [emphasis added]". As noted in *Sebring Pottery Co.* v. *Steubenville Pottery Co.*, 9 F. Supp. 384, 387 (N.D. Ohio 1934), statutory damages under this provision "may be assessed against all copies made, not merely those distributed." Similarly,

under Section 101(d) all "infringing copies" of "any work" (§ 101, preamble) are subject to destruction and this must, of necessity, involve copies "made" but not "sold". *Cf. Foreign & Domestic Music Corp.* v. *Licht*, 196 F. 2d 627 (2d Cir. 1952). These provisions of Section 101 make it abundantly clear that "infringement" occurs upon the mere "making" of copies of books and journals.

The legislative history of the Copyright Act of 1909 is most relevant. Provision for the right to "copy" in Section 1(a) did not slip unobstrusively into the law; both the House and Senate Committees reporting on the relevant bills specifically noted the "insertion of the word 'copy'". H.R. Rep. No. 2222, 60th Cong., 2d Sess. 4 (1909); S. Rep. No. 1108, 60th Cong., 2d Sess. 4 (1909).

The Trial Judge in this case believed it "reasonable to infer" that the addition of the "copying" right was made "in light of the fact that new technologies (e.g., photography) made it possible to duplicate books and periodicals by means other than 'printing' and 'reprinting'". Pet. App. 45, 50. The majority below disagreed, crediting instead an argument that the 1909 Act did "not suggest any purpose to alter the previous coverage". Pet. App. 9. However, a careful examination of the appropriate legislative history clearly demonstrates the accuracy of the Trial Judge's suggestion. Thus, in the President's message to Congress in 1905 in connection with the revision program which culminated in the 1909 Act, he observed that the then-current copyright laws "omit provision for many articles which, under modern reproductive processes, are entitled to protection". Congressional Record, Dec. 5, 1905 at 102. As suggested by the Trial Judge, Congress was acutely aware of and concerned with the effects of new reprographic devices. Indeed, both the House and Senate Reports on the 1909 Act refer to the President's message, including the above passage, after quoting an address by a prominent attorney

of the time:

> ". . . the reproduction of various things which are the subject of copyright has enormously increased. The wealth and business of the country *and the methods and means of duplication* have increased immeasurably. The law requires adaptation to these modern conditions". [H.R. Rep. No. 2222, 60th Cong., 2d Sess. 1 (1909); S. Rep. 1108, 60th Cong., 2d Sess. 1 (1909) (remarks of Hon. Samuel J. Elder, Esq.; emphasis added)]

Also significant are the changes in wording of the various bills ultimately emerging as the 1909 Copyright Act. The original "Memorandum Draft of A Bill To Amend and Consolidate the Laws Respecting Copyright" prepared by the Copyright Office for the 1905 revision conferences* accorded copyright proprietors the exclusive right "to make for sale, distribution, exhibition, or hire any copy by any means whatsoever, or in any form, or for any purpose, of a work the subject of copyright . . ." Memorandum Draft § 37(a) in Conferences on Copyright, Second Session (November 1-4, 1905).** When the Register of Copyrights presented this draft provision to the conference members, he specifically omitted the words "for sale, distribution, exhibition or hire", retaining the copying "for any purpose" clause without qualification. Conferences on Copyright, Second Session at 314-315 (meeting of November 3, 1905). Accordingly, when the Copyright Office presented its revised "Memorandum

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* The conferences were convened by the Librarian of Congress and attended by various interested organizations to consider overall revision of the copyright laws. See generally, Goldman, *The History of U.S.A. Copyright Law Revision From 1901 to 1954*, Copyright Law Revision Study No. 1 at 1-3 (1955).

** References are to the Conference documents as collected in the volumes of the U.S. Copyright Office.

Draft" to a later session of the revision conference, the "exclusive rights" of a copyright proprietor included the right "to make any copy by any means whatsoever, or in any form, or for any purpose . . ." Memorandum Draft § 55(a) in Conferences on Copyright, Third Session (March 13-16, 1906). At the conclusion of the revision conferences, the Copyright Office redrafted its proposed revised copyright law, submitting it to Congress on May 31, 1906 as H. R. 19853 and S. 6330 (59th Cong. 1st Sess.). Section 1(a) of this bill accorded copyright proprietors the exclusive right "to make any copy of any work" for the purposes of sale, distribution, exhibition or leasing; however, section 22 expressly added a prohibition of *"any* reproduction, without the consent of the author or copyright proprietor, of any [copyrighted] work . . . [emphasis added]." That section 22 was an "addition" and that the word "any" was intended as all-inclusive is made clear by the Librarian of Congress' report on the bill. He noted:

> "The bill, having defined the right of the copyright proprietor as the *exclusive* right to do certain things, defines an infringement to consist in the doing or causing to be done without his consent of any of these things, the right to do or to authorize which is reserved to him. It contents itself with this, adding only the one specification that *'any* reproduction' without his consent 'of any work or material part of any work in which [his] copyright is subsisting' shall be an infringement". [Report of the Librarian of Congress for the fiscal year ending June 30, 1906 at p. 116; emphasis in original].

After the Hearings on these bills were completed, the Register of Copyrights and the Committees of the House and Senate redrafted the bill, introducing a revised bill on January 29, 1907 as H. R. 25133 and S. 8190 (59th Cong. 2d Sess.). In these bills, Section 1(a) was revised to adopt the present language according the rights to "print, reprint, publish, copy and vend" without limitation

and this phraseology remained the same in the later bills culminating in the Act of 1909. From what had gone before, it is clear that the right to "copy" in the 1909 Act is absolute and not restricted as to purpose, technique or otherwise in its application to books and periodicals.

In reaching its "doubt" as to the applicability of the right to copy to books and periodicals, the majority of the Court of Claims relied on the fact that " the court-created doctrine of 'fair use' . . . is alone enough to demonstrate that Section 1 does not cover all copying". Pet. App. 8. However, the quoted proposition is irrelevant to the point at issue. "Fair use" is a *privilege* to engage in certain kinds of copying of a work which would *otherwise violate the "copying" rights accorded by the Act to that work. Rosemont Enterprises, Inc.* v. *Random House, Inc.*, 366 F. 2d 303, 306 (1966), cert. denied 385 U.S. 1009 (1967). It assumes that the right to "copy" *is* applicable to the work used; if it were not, the privilege of fair use would be unnecessary. The majority's error in relying on the doctrine of fair use as proof that the right to copy is not applicable to books and journals is compounded subsequently in its opinion, where it states that one reason respondent's photocopying should be considered fair use is because of its doubt as to the applicability of the right to copy. Pet. App. 23. Thus, the majority's reasoning is entirely circular—there may be no exclusive right to "copy" books and journals because of fair use; and there is fair use because there may be no right to copy books and journals. It should be noted that even the doctrine of fair use traditionally applied by the courts is based on criteria protective of the economic interests of copyright proprietors. See, e.g., *Folsom* v. *Marsh*, 9 Fed. Cas. 343 (Circ. Ct. D. Mass. 1841).

The Court below also asserted that "it is almost unanimously accepted that a scholar can make a handwritten copy of an entire copyrighted article for his own use . . . ." Pet. App. 8. This assertion too is irrelevant. Even

apart from the fact that this case does not involve a scholar's own use (Point I), since the invention of the Gutenberg press it has been known that there is no rational equation between manual transcription and mechanical duplication. The former has no economic consequences while the latter is the basis for the existence of the entire publishing industry.

To support its "doubt" that the right to copy applies to books and periodicals, the Court of Claims also relied on certain "Rules" of the Library of Congress applying to the Library's photoduplication of materials during "the time of enactment and first three decades of the 1909 Act" and the tenure of Herbert Putnam, "a leading public sponsor of the 1909 Act", as Librarian of Congress. Although the Court considered the Library's activities to be "revealing" (Pet. App. 9) and "illuminating" (Pet. App. 10) it again missed the mark.

Assuming that the early practices of the Library of Congress are probative of the meaning of the 1909 Copyright Act, the relevant question is not simply whether the Library performed photoduplicating services, but whether such services encompassed the reproduction of copyrighted works without permission of the copyright owner (and, if so, under what circumstances, to what extent, and of how much of the work). Since the documents relied upon by the majority below were never offered into evidence at the trial of this case (they surfaced as part of argument in an *amicus* brief in support of respondent below), petitioner was never able to examine on these issues. The Court of Claims' reliance is thus based on a unilateral inference that the Library freely engaged in wholesale copying of copyrighted works, without permission, drawn from unexplained and ambiguous factual statements existing *dehors* the trial record.

A careful study of the history of photoduplication by the Library of Congress—which must perforce also go out-

side the record—shows other possible inferences to be drawn from the Library's practices and, indeed, strongly suggests that the Library's interpretation of the 1909 Act was that it *forbad* the photoduplication of copyrighted books and journals without permission. An analysis of the sources relied upon by the Court of Claims and others not called to its attention is set forth in the Appendix to this brief.

B. Photoduplication is a "Printing" and "Reprinting" Proscribed by Section 1(a).

In concluding that respondent's libraries had not "printed" or "reprinted" petitioner's works within the meaning of Section 1(a), the Court of Claims first stated that "the photocopy process of NIH and NLM . . . does not even amount to printing or reprinting in the strict dictionary sense . . . ." Pet. App. 10-11. Among the numerous dictionary definitions of "print", however, is "to produce by means of a reproductive process". Random House Dictionary of the English Language 1144 (Unabridged Ed., 1969). The statutory use of "print" and "reprint" cannot reasonably be limited to letterpress. See *Macmillan Co.* v. *King,* 223 Fed. 862, 867 (D. Mass. 1914). If it is so limited, *amici's* works will be shorn of protection not only from the users of Xerox machines, but also from reproduction by offset, microform, and the various other photography-based techniques which are replacing the letterpress and, indeed, are the essence of the contemporary reprint industry. See Nemeyer, Scholarly Reprint Publishing in the United States 4 (1972). To state this proposition is to refute it; for both practical and statutory purposes, the Xerox machine is as much a printing device as the Gutenberg press or letterpress.

Numerous cases have found infringement of copyrighted text by photomechanical processes. See, e.g., *American Code Co. (Inc.)* v. *Bensinger,* 282 Fed. 829 (2 Cir. 1922)

(photolithography); *N.Y. Tribune* v. *Otis & Co.,* 39 F. Supp. 67 (S.D.N.Y. 1941) (photostat); *R. R. Donnelley & Sons Co.* v. *Haber,* 43 F. Supp. 456 (E.D.N.Y. 1942) ("photographic process"); *American Visuals Corporation* v. *Holland,* 239 F. 2d 740 (2d Cir. 1956) (photostat); see also, *Wihtol* v. *Crow,* 309 F. 2d 777 (8th Cir. 1962) ("school duplicating machines"). That "printing" for statutory purposes includes photographic printing techniques is also demonstrated by the direction that the copyright notice for motion pictures and videotapes include the year of first publication. See U.S. Copyright Office Circular 45 (1972). Under the Act, the year of publication can only be required of "printed" works. 17 U.S.C. § 19.

Alternatively, the Court below stated that "print" and "reprint" might "be used more broadly to include all mechanical reproduction of a number of copies", but held that this "would still not cover the making of a single copy for an individual requester". Pet. App. 11. This definition and exclusion lacks support in both fact and law.

As has been noted, "[t]he ability to produce single copies economically is the major feature of the reprographic revolution". *New Technology and The Law of Copyright: Reprography and Computers,* 15 U.C.L.A.L. Rev. 939, 941 (1968). Entire reprinting businesses are based on the concept of "on-demand reprinting" of "single copies" in response to "individual requests"; "single copy reprints" and "1 copy editions" is common terminology. See, e.g., Melcher, *New Techniques Permit the Reprinting of Books in Editions of 1 to 100 Copies,* 1960 American Library & Book Trade Annual 101 (Melcher's description of the single-copy on-demand printing techniques of University Microfilms, utilizing microfilm and Xerox Copyflo printers, is remarkably similar to the techniques used by respondent's libraries. See F # 15, Pet. App. 80; F # 21 (b), Pet. App. 84.); *" 'Demand' Publishing and Reprint Publishing",* Publishers Weekly, July 29, 1968 at 22; *"There's Money in Microfilms",* Business Week, April 22, 1961 at

145. The majority's alternative definition concedes, as it must, that "printing" and "reprinting" include contemporary means of "mechanical duplication"; there can be no legal or economic logic for including in that definition only those systems producing multiple copies in response to single requests.

The Court's conclusion is also in conflict with established law that copyright infringement does not depend on the number of copies or recipients involved. See *Douglas* v. *Cunningham*, 294 U.S. 207, 210 (1935); *Shapiro, Bernstein & Co.* v. *4636 S. Vermont Ave., Inc.*, 367 F. 2d 236 (9th Cir. 1966). It also conflicts with the principle that "printing" is an act of infringement independent of the circumstances of any request made to the printer. See 1 Nimmer, Copyright § 102.

The Copyright Act expressly bars the one-at-a-time importation into the United States of even *single* "piratical" —i.e., infringing—copies for the use of an *individual* (the same bar extends to importation of single copies for educational or scientific purposes, or by schools or libraries). 17 U.S.C. § 107, *proviso*. There can be no justification for permitting domestic production of unauthorized copies under similar circumstances. Similarly, copyright has been held infringed by a single performance. See e.g., *Chappell & Co.* v. *Middletown Farmers Market & Auction Co.*, 334 F. 2d 303 (3d Cir. 1964). If such ephemeral use constitutes infringement, all the more so must the production of a tangible copy capable of permanently satisfying consumer demands.

Furthermore, respondent's libraries do reproduce multiple copies of the same work. As noted by the Trial Judge, the "single copy per request" limitation is "illusory and unrealistic." Pet. App. 45, 52. Thus he noted that:

> "Admittedly, the libraries, as a general rule, make only one copy per request, usually for different users. But the record shows that the libraries duplicate particular articles over and over again, sometimes even for the same user within a short timespan. E.g., the NIH library photocopied the Count I article three times within a 3-month period, two of the times for the same requester; and it copied the Count IV and Count V articles twice within a 2-month period, albeit for different users. The record also shows that NLM will supply to requesters photocopies of the same article, one after the other, on consecutive days, even with knowledge of such facts. In short, the libraries operate comprehensive duplication systems which provide every year thousands of photocopies of articles, many of which are copies of the same article; and, in essence, the systems are a reprint service which supplants the need for journal subscriptions. The effects of this so-called 'single copying' practice on plaintiff's legitimate interests as copyright owners are obvious. The Sophar and Heilprin report, at 16, puts it in terms of a colorful analogy; 'Babies are still born one at a time, but the world is rapidly being overpopulated' ".

There can be no rational basis for making copyright protection dependent upon whether one or more copies are produced, or whether they are produced for the same or different users, or whether the same user makes his request at one or more times. Moreover, the microfilm/Xerox Copyflo techniques utilized by defendant's libraries apparently did regularly make multiple copies (a microfilm copy and a Xerox copy) of the same work at the same time in response to the same request. See F. #15, Pet. App. 80; F. #21(b), Pet. App. 84. *Cf. Patterson* v. *Century Productions*, 93 F.2d 489, 493 (2d Cir. 1937), cert. den. 303 U.S. 655 (1938). If this requires even further distinctions, it serves thereby to demonstrate the illogic of the "single copy" argument.

C. The Libraries' Providing of Photocopies Is "Publishing" Proscribed by Section 1(c).

After holding that respondent had not violated petitioner's exclusive right to "print and reprint" its works, the Court of Claims held that "for similar reasons" respondent's libraries had not violated petitioner's rights to "publish" its works. To the extent that the Court's reasoning on this issue encompasses the thought that the dissemination of a "single copy" cannot be a publication, it is rebutted by the authorities and points referred to above. See also, e.g., *Bobbs-Merrill Co.* v. *Straus,* 147 Fed. 15 (2d Cir. 1906), aff'd 210 U.S. 339 (1908) ("publication" by sale of a single copy).* Of course, a large portion of the commercial market for *amici's* publications comprises single copies sold to individual customers.

NIH made photocopies available to any of its personnel and NLM made photocopies available to any requesting party through inter-library loan. In neither case was the copy required to be returned; nor were there any restrictions placed on the recipients' rights to further disseminate or duplicate the photocopies. See fn. p. 7, *supra.* In both cases the library functioned simply to provide interested parties with copies of petitioner's works for whatever use they might wish—i.e., for the same purpose as petitioner and *amici* distribute their works. As a matter of law, as a matter of function, and even as a matter of semantics, respondent's libraries "published" copies of petitioner's works. See, e.g., *White* v. *Kimmel,* 193 F. 2d 744 (9th Cir.) cert. den. 343 U.S. 957 (1952); *American*

* The *Bobbs-Merrill* court did refer to copyright as the right to "multiply copies". However, this does not suggest agreement with the Court's "single copy" argument. Respondent's libraries had one copy and made (at least) one more. The resulting (minimum of) two copies was a "multiplication". As pointed out in *Jeweler's Circular Pub. Co.* v. *Keystone Pub. Co.,* 281 Fed. 83, 94 (2d Cir.) cert. den. 259 U.S. 581 (1922) to define copyright as the sole right of multiplying copies "means that you must not copy matter copyrighted."

Visuals Corporation v. *Holland,* 239 F. 2d 740 (2d Cir. 1956); *Continental Casualty Co.* v. *Beardsley,* 253 F. 2d 702, cert. den. 358 U.S. 816 (1958).

The majority's purported analogy to the doctrine of a limited publication which does not divest common law rights is inappropriate. Under the reported cases, the distribution of copies in the manner at issue would not fall within this doctrine. See *White* v. *Kimmel, supra*; *American Visuals Corporation* v. *Holland, supra;* see also, *Continental Casualty Corp.* v. *Beardsley, supra.* In any event, even a "limited publication" is an infringement of section (1a). *Macmillan Co.* v. *King,* 223 Fed. 862 (D. Mass., 1914). This is consistent with the fact that (i) the doctrine of limited publication is designed to avoid a forfeiture of common law rights and hence *protect* literary property owners from infringement; and (ii) a limited publication is sufficient to *invest* the rights of statutory copyright. As stated in *American Visuals Corporation* v. *Holland, supra* at 744: "[i]n each case the courts appear to treat the concept of 'publication' as to prevent piracy."

D. The Relevance of Section 1(c).

Section 1(c) of the Copyright Act, as amended in 1952, accords to the proprietor of copyright in a "nondramatic literary work" (which would include petitioner's journals and much of *amici*'s works) the exclusive rights, *inter alia,* to "reproduce it in any manner or by any means whatsoever" and to make "any transcription" thereof. It is submitted that the infringement issue in this case could be resolved simply on the basis of the rights of reproduction and transcription in section 1(c). Since, however, this provision was not cited below and we do not believe it necessary to a determination of infringement, we would merely call it to this Court's attention as indicative of the intent of the statute to protect the copyright owner against any means of *reproducing* his work, regardless of the varying technology which might be developed to achieve this end.

CONCLUSION

The interpretations of the Copyright Act by the Court of Claims are in error and the order dismissing the petition should be reversed.

Respectfully submitted,

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APPENDIX

Photocopying Rules and Practices of the Library of Congress

(1) The Court of Claims noted that while the bills leading to the Copyright Act of 1909 were being considered by Congress, the Library's 1908 "Rules of Practice Governing the Use and Issue of Books" (p. 6) provided:

> "Photographing. Photographing is freely permitted. The permission extends to the building itself and any of its parts, including the mural decorations. It extends to articles bearing claim of copyright, but the Library gives no assurance that the photograph may be reproduced or republished or placed on sale. These are matters to be settled with the owner of the copyright".

The very language of this provision indicates that it was concerned not with the Library's photoduplication of books and journal "articles," but rather with library visitors taking "snapshots" or the like of three-dimensional artifacts. (See the dissenting opinion of J. Nichols below, Pet. App. 69.) This is also suggested by the fact that the Library of Congress apparently did not install a photostat machine until 1912,* and by the fact that, as noted below, specific provision for photostatic reproduction services was made *in addition to* the "Photographing" provision in editions of the Library's Rules issued after that year. (That the Library's "permission" extended to copyrighted three dimensional objects on its premises is irrelevant to this case since the effects and circumstances of such practices

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* See Thompson, *The Microfacsimile in American Research Libraries*, 8 Libri (Int'l. Lib. Rev.) 209 (1958). Originally, of course, a "photocopy" in the sense at issue in this case "was a photostat and nothing but a photostat". Hawken, *Reprographic Technique: Present and Future* in Hattery & Bush, Reprography and Copyright Law 39 (1964).

are entirely different. Moreover, it indicates absolutely nothing about the point at issue—*viz.*, whether the right to copy applies to books and periodicals.)

(2) The Court of Claims also noted that after the passage of the Copyright Act of 1909, the 1913 edition of the Library's "Rules" added a provision entitled "Photostat" after the "Photographing" section. The "Photostat" section stated:

> "Photo-duplicates of books, newspapers, maps, etc. can be furnished at a reasonable rate by means of the photostat, installed in the Chief Clerk's Office. Apply to the Chief Clerk for a schedule of charges." [Lib. of Cong., Rules of Practice Governing the Use and Issue of Books 6 (1913); Pet. App. 10]

This provision says nothing about whether the subjects of such photoduplication might include copyrighted works and, if so, to what extent, etc. Since, in the retained provision on "photographing" [Pt. (1), above] the Library felt it necessary to specify that copyrighted artifacts might be photographed, the proper inference to be drawn from the silence of the photostat provision might well be that copyrighted books, etc. would not be copied without permission. This is also suggested by changes in later editions of the "Rules" noted below. On its face, however, this provision is totally ambiguous with respect to the relevant points at issue.

Consideration should also be given to the nature of these so-called "Rules". They did not purport to be a complete or detailed compendium of Library regulations. They represented "a body of practice rather than a formal set of definitions adopted at one time, or *a priori*" and an attempt to "summarize" the Library's experience.

Library of Congress, Rules of Practice Concerning The Use and Issue of Books 3 (1913).

(3) The Court of Claims further asserted that later editions of the Library's Rules "throughout Dr. Putnam's tenure (which ended in 1939), contained the same or comparable provisions". Pet. App. 10. This is simply incorrect. In 1921, the "Photostat" section was changed to refer to the "photoduplicat[ion] of *certain classes* of books . . ." (emphasis added). Library of Congress, Rules of Practice Concerning the Use and Issue of Books 6 (1921). (This qualification was repeated in the subsequent editions of the Rules in 1929 and 1932). In view of the retained reference to the permissible "photographing" of copyrighted artifacts and subsequent specific references to the Library's refusal to photoduplicate copyrighted textual works [Pt. (4), below] it is at least a fair inference that copyrighted books and journals were among the forbidden "classes". This qualification as to "classes" was retained in the 1929 and 1932 editions of the Rules. However, in the 1939 edition (p. 5) the "Photostat" section was changed again and now referred simply to the fact that "The Library of Congress maintains a Photoduplication Service [i.e., as a department] from which copies (on film or paper) of available materials may be obtained at nominal cost." As noted immediately below, a basic tenet of the Library's Photoduplication Service from its inception has been the refusal to duplicate copyrighted works without permission.

(4) It is apparent that the Library of Congress did provide photostats, although not necessarily of *copyrighted* works, from 1912 through 1938. However, the extent of photocopying was apparently rather minimal in view of the lack of sufficient government appropriations for photographic apparatus. See Schwegmann, *The Photoduplication Service of The Library of Congress*, J. Docu-

mentary Reproduction, September, 1939 at 176. (Mr. Schwegmann also referred to "legal limitations" as a bar to meeting all photocopy requests prior to establishment of the Photoduplication Service. Id. Although not entirely clear, it is not unreasonable to assume that copyright was among such limitations. If this was the case it is clear from the announced policies noted subsequently that although the establishment of the Photoduplication Service solved the Library's financial needs, it did not remove the limitation imposed by copyright).

In 1938 Dr. Putnam accepted a grant from the Rockefeller Foundation and established the Library's Photoduplication Service. See Schwegmann, *supra*; Annual Report of the Librarian of Congress for the Fiscal Year Ending June 30, 1938 at 312.

In 1939-40 the Service commenced regular operations. See Annual Report of the Librarian of Congress for the Fiscal Year Ending June 30, 1940 at 192. *Virtually from its inception the announced policy of the Photoduplication Service has been that it will not reproduce copyrighted works without permission;* the relevant statements suggest that such restraint had always been the basic policy of the Library. See e.g., The Library of Congress—Its Collections and Services (Gov't. Pr. Off.—1941 ed. at 9; 1942 ed. at 12; 1945 ed. at 12) (The Photoduplication Service provides copies "subject to the usual copyright limitations"); Annual Report of the Librarian of Congress for the Fiscal Year Ending June 30, 1947 at 35 ("The Library must of course in its photocopying activities scrupulously observe copyright, and accordingly never reproduces work in which copyright is claimed, without the proprietor's permission"); The Library of Congress and Its Work at 9 (Gov't. Pr. Off. 1950) ("Copies of materials . . . in photostat . . . not subject to copyright or other restrictions are provided at a moderate charge"); The Library of Congress—1800-1950—Photoduplication Service at 2 (Lib. of Cong. 1950)

("Copyrighted material will ordinarily not be copied without the signed authorization of the Copyright Owner"•).

(5) In 1944 a bill was introduced in Congress which specifically provided that under certain circumstances the making of a photocopy of copyrighted works by the Librarian of Congress for, among others, members of the public was not an infringement of copyright. S. 2039, 78th Cong., 2d. Sess. Its introduction is further evidence that the Library considered itself bound by copyright restrictions as a matter of basic policy. (No action was taken on this bill; however, in view of the policy of not copying copyrighted materials followed by the Library even after its introduction, this cannot be attributed to a belief that the Library had the right to photocopy copyrighted works, without permission, under existing law.)

(6) The Court of Claims also considered it significant that in 1939 Dr. Putnam "was honored by the American Council of Learned Societies because (among other things) 'You have led in adapting the most modern photographic processes to the needs of the scholar, and have • • • made widely available for purposes of research copies of your collections • • •'". Pet. App. 10. The Court's apparent inference that Dr. Putnam believed it permissible to photoduplicate copyrighted books and journals without permission is, again, unsupported. It is equally, if not more, logical to assume that the praise was directed (a)

• The use of "ordinarily" did not imply exceptions to the principle that the Library would not duplicate copyright materials without consent. It is explained, instead, by a subsequent reference in the same source (p. 9) to the fact that the Library had "compiled a substantial list of blanket copyright releases from newspaper and magazine publishers" which permit, "under certain conditions, the reproduction of copyrighted material for official or public use without specific correspondence with the copyright proprietor in each case". See also, Annual Report of the Librarian of Congress for the Fiscal Year Ending June 30, 1948 at 46.

to Dr. Putnam's efforts in establishing the Library's Photoduplication Service (which has traditionally refused to duplicate copyrighted works without permission); and/or (b) to his efforts in acquiring for the Library's collections facsimile copies of foreign materials (which might well have been in the public domain in this country, or secured with permission). See Putnam, American Research Libraries in Relation to Scholarly Studies (Lib. of Cong. pamph. 1929).

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Since at least 1941 the Library of Congress has announced a policy of refusing to photoduplicate copyrighted works without permission of the copyright owner. *Amici* concede that on this documentary record it is impossible to accurately determine the Library's policy at the inception of the 1909 Copyright Act; they submit, however, that the Court of Claims' inference that the Library freely photocopied copyrighted material without permission at that time is entirely unjustified.